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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 66

LOUIS DABNEY SMITH, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT**

PETITION FOR CERTIORARI FILED APRIL 25, 1945.

CERTIORARI GRANTED MAY 28, 1945.

SUPREME COURT OF THE UNITED STATES

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UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT

No. 5329

THE UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

LOUIS DABNEY SMITH

Defendant-Appellant

APPEAL

FROM A JUDGEMENT OF THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

APPENDIX

for Appellant's Brief

CURRAN E. COOLEY

GROVER C. POWELL

HAYDEN C. COVINGTON

Counsel for Appellant

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Judgment and Commitment

District Court of the United States
Eastern District, South Carolina
Columbia Division
No. 15,545

United States

v.

Louis Dabney Smith

Criminal Indictment in one count for violation of U. S. C., Title 50 Secs. 311, Appendix.

On this 9th day of November, 1944, came the United States Attorney, and the defendant Louis Dabney Smith appearing in proper person, and by counsel and,

The defendant having been convicted on Verdict of Guilty, No. 10th, 1944, of the offense charged in the indictment in the above-entitled cause, to wit:

Vio. Sec. 311, Appendix Title 50, U. S. C. A., (Selective Training and Service Act of 1940) one count, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It is by the Court

Ordered and adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Three (3) Year and Six (6) Months.

It is further ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshall or other qualified officer and that the same shall serve as the commitment herein.

(Signed) Geo. Bell Timmerman
United States District Judge.

*Indictment***Indictment**

THE UNITED STATES OF AMERICA
EASTERN DISTRICT OF SOUTH CAROLINA
IN THE DISTRICT COURT
COLUMBIA DIVISION

UNITED STATES v. LOUIS DABNEY SMITH

At a stated term of the District Court of the United States for the Eastern District of South Carolina, begun and holden at Columbia, within and for the District aforesaid, on the first Tuesday of November, 1944, the grand jurors of the United States of America, within and for the District aforesaid, upon their oaths respectively, do present that Louis Dabney Smith, late of Richland County, South Carolina, hereinafter called the defendant, on the 30th day of September, 1943, in the County of Richland, State aforesaid, in the aforesaid Division and district and within the jurisdiction of this Court, unlawfully, knowingly and wilfully failed and neglected to perform the duty which he was required to carry out under the provisions of the Selective Training and Service Act of 1940, approved September 16, 1940, and the rules and regulations promulgated and prescribed thereunder; that is to say, the said defendant being a resident of the County of Richland, State aforesaid, and within the jurisdiction of the Selective Service Local Board No. 68, Richland County, South Carolina, having registered in accordance with the provisions of the Selective Training and Service Act of 1940 and having been subject to such provisions and the rules and regulations promulgated and prescribed thereunder and being under the jurisdiction and subject to the orders of the said Selective Service Local Board No. 68, Richland County, South Carolina, and having been ordered by the said Local Board to report for induc-

tion on the said 30th day of September, 1943, failed, neglected and refused to report for induction as ordered by the said Local Board; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

1st Count Sec. 311, Appendix Title 50 U. S. C. A.

Motion to Quash Indictment

Now comes the defendant and moves the court to quash the indictment and to order the prosecution dismissed because;

The indictment fails to state an offense against the laws of the United States.

The indictment is insufficient to state an offense.

The indictment fails to definitely and sufficiently advise the defendant of the nature of the offense charged. It does not appear therefrom what order and regulation under the Selective Training and Service Act the defendant is charged with violating. The indictment should state the order and regulation that the defendant is alleged to have violated.

The criminal sanctions clause of section 11 of the Act and the Regulations thereunder requiring the defendant to comply with the order made have been construed by the courts so as to require the defendant "who has been examined on a preinduction physical examination and declared acceptable and who has exhausted his administrative remedies by complying with and submitting to the selective process which was completed before the order to report for induction was issued, and who thereafter reports for induction but who refused to submit to induction at the Army Reception Center" as a condition precedent to testing the invalidity of the classification to submit to induction pursuant to the illegal order upon which the indictment is based, a vain and needless thing or act. The construction of the Act and Regulations penalizes the defendant for having failed

to submit to induction by denying him the right to show that the order is invalid because of defendant's exemption from duty under the Act as a minister of religion, thus making said Act and Regulations thereunder unconstitutional and void for each of the following reasons, to wit:

(a) They constitute a bill of attainder, contrary to clause 3 in section 9 of Article I of the Federal Constitution.

(b) They transfer and surrender the judicial power of the United States Courts in the trial of a criminal case from said courts to the draft boards, so as to permit said boards to determine the guilt of the defendant, a judicial function, contrary to Article III of the Federal Constitution.

(c) They abridge the right of the defendant to have a judicial trial and deny him the right to prove his innocence, and also his right to be heard in his defense, contrary to the due process clause of the Fifth Amendment to the Federal Constitution.

(d) They deny and abridge the right of the defendant to a trial by jury and the privilege of having a jury pass on whether the defendant owes a duty because exempt and whether he is guilty of failure to perform a duty, contrary to the provisions of the Federal Constitution guaranteeing a trial by jury and to the Sixth Amendment forbidding the denial thereof.

(e) They permit conviction without evidence or upon hearsay evidence and deny the defendant the right of counsel in his defense contrary to the Fifth and Sixth Amendments to the Federal Constitution.

(f) They permit the draft boards to determine the guilt of the defendant, who is exempt and could not be found guilty of violating a duty under the Act, and thereby the Act and Regulations are converted into an ex post facto law, contrary to clause 3 in section 9 of Article I of the Federal Constitution.

WHEREFORE, the indictment being insufficient and the

law being unconstitutional and void as construed, it will not support a prosecution. Accordingly the indictment should be quashed and dismissed with an order discharging the defendant from all liability. Defendant prays for such other and further relief to which he may justly be entitled in the premises.

Transcript of Testimony and Proceedings

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF
SOUTH CAROLINA
COLUMBIA DIVISION

UNITED STATES v. LOUIS DABNEY SMITH

OFFENSE:

**VIOLATION OF THE SELECTIVE TRAINING
AND SERVICE ACT OF 1940**

**FAILURE TO REPORT FOR INDUCTION
SEPTEMBER 30, 1944**

**VIOLATION OF SECTION 311
APPENDIX TITLE 50 U.S.C.A.**

For the United States: Messrs. C. N. Sapp, United States Attorney, Mr. H. H. Edens, Asst. United States Attorney, of Columbia, S. C., and Mr. Louis Shimel, Asst. United States Attorney, Charleston, S. C.

For the Defendant: Messrs. Curran E. Cooley, of Anderson, S. C., and Grover C. Powell, of Atlanta, Ga.

Reported by A. M. Deal, Columbia, S. C.

Mr. Powell: We have a motion to quash the indictment.
The Court: All right, read it.

The Court: The motion is overruled. Motion to quash.
Are you ready to proceed?

Mr. Smith, do you wish to plead guilty or not guilty?

Paul H. Leonard, direct

The Defendant (Louis D. Smith): Not guilty.

PAUL H. LEONARD,

a witness for the United States, was sworn and testified as follows:

DIRECT EXAMINATION

By Mr. Edens:

Q You are Mr. Paul Leonard of Columbia, S. C.?

A Yes.

Q What position do you occupy and what position did you occupy on September 30, 1943?

A Clerk of Local Draft Board No. 68, Columbia, S. C.

Q Do you know Louis D. Smith? Is he registered with your Board?

A Yes.

Q And do you have his address?

A Yes.

Q What is his address?

A 1706 Crestwood Drive, Columbia, S. C.

Q Prior to September 30, 1943, was he sent an Order to report for induction?

A Yes.

Q When was that Order sent to him and where was it sent?

A It was sent on September 18, 1943.

Q The Selective Service Regulations are administered by whom at Local Board 68?

A I am responsible for the administration of Selective Service law in Local Board 68.

The Court: Have you the record here to show how he was qualified?

A Yes, sir.

Questions by Mr. Edens:

What was the classification?

Witness: The classification is 1-A.

Q And as a result of such classification pursuant to instructions from your Board what did you do?

A He was ordered to report for induction on the 30th day of September, 1943.

Q How do you know that he did not report?

A Because I went out to the truck in Columbia. Government transportation was furnished by the Local Board to the Fort. And I had his name together with two other names to determine whether he did report, and he did not answer, and the truck left the office, and he wasn't at the office and didn't report as ordered.

Q And the Order read for him to report at 8:30 on the morning of the 30th, is that correct?

A Yes, sir; at the office of the Local Board to the Local Board on the 30th of September, 1943.

CROSS EXAMINATION

Questions by Mr. Powell:

Q Did you receive a phone call from the induction station?

Mr. Shimel: We object to that.

Questions by Mr. Powell:

Q From the officer charged with inducting registrants?

The Court: He can answer yes or no.

Witness: After the other registrants had left in a truck and reported as ordered I did receive a call from the induction station. From whom, I do not recall.

C. M. McCracken, direct
Paul H. Leonard, recalled, cross

C. M. McCracken,

a witness for United States, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by Mr. Edens:

Q You arrested Louis D. Smith subsequent to September 30, 1943?

A Yes.

Q Did he at the time you arrested him advise you whether or not he had received his Order to Report for Induction?

A Yes, he did.

Q Did he state to you that he had received his Order to Report for Induction on September 30, 1943?

A Yes, he said he received the Notice to Report for Induction.

PAUL H. LEONARD,

a witness for United States, recalled, testified as follows:

CROSS EXAMINATION

Questions by Mr. Powell:

Mr. Powell: At the present we merely want the introduction of this evidence.

Mr. Shimel: We object to it.

The Court: The Supreme Court has decided that I cannot review what the Draft Board did. And that is precluded as far as this Court is concerned.

Mr. Powell: We except to the Court's ruling and ask that it be marked for identification.

The Court: Marked for identification, and excluded.

(Questionnaire marked for identification Defendant's Exhibit A.)

○ LOUIS D. SMITH,
the defendant, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by Mr. Powell:

Q Is this Louis Dabney Smith?

A Yes, sir.

Q What is your occupation, Mr. Smith?

A I am a minister of Jehovah God. I am a minister of the Watchtower Bible and Tract Society.

Q How old are you?

A Twenty one years old.

Q How long have you been a minister?

Mr. Schimmel: We object to that on the ground that it is immaterial.

The Court: Excluded.

Mr. Powell: We except to the ruling and state that if the defendant were permitted to answer he would state that he has been a minister for a number of years before his registration.

The Court: To be perfectly frank about it, what you are trying to do is attack the rulings of the Draft Board?

Mr. Powell: May it please the Court, I believe honestly under the Court's ruling relative to our Motion to Quash we have a legal right—

The Court: That is your purpose?

Mr. Powell: Under our Motion to Quash.

The Court: That is your intention now?

Mr. Powell: Yes.

The Court: I hold that you cannot do it. And that is the decision of the Supreme Court in more than one case.

Questions by Mr. Powell:

Q Mr. Smith, how long have you been a student of the Bible?

Mr. Schimmel: We object to that.

The Court: That is excluded.

Mr. Powell: We except, and as a part of our exception we would state that if he were permitted to answer he would state that he has studied it from childhood.

Q Were you taught the Scriptures by your mother and by your grandparents?

A Yes, sir.

Mr. Schimmel: Your Honor, I do not think the rule requires him to keep on asking questions.

The Court: No. I think your questions are all about the same point, the same issue. I have already made several rulings on it, and I do not see that I am required to occupy an hour of the Court's time in ruling the same thing over and over.

Mr. Powell: We call your Honor's attention to the fact that the document introduced by the Prosecution has matter in it relative to his ministerial status, how long he studied, and we have a right now as a part of our defense to cover the same ground.

The Court: No, the only issue involved here is whether this man was classified, and having been classified he was ordered to report for induction, and having been ordered to report for induction, he failed to report for induction. This Court and this jury have nothing to do with whether he was properly classified or not.

Mr. Powell: May it please the Court, may I ask a broad question and then make a statement—a general statement that we would like to make as a ground for our exceptions so as to preserve our rights?

The Court: You want to attack the Local Board. And I am ruling that you cannot do it. That is plain enough, isn't it?

Mr. Powell: We would like to get our exceptions as to that.

The Court: You cannot offer testimony to attack the action of the Local Board. Now, you can have an exception

to that, if you want it.

Mr. Powell: May it please the Court, we take this position, that this defendant has complied with all of the ministerial regulations completely under the Billings case and now that he has the right in this case to attack the rulings of the Board as the Supreme Court of the United States said that he did have the right to attack in the Falbo case.

I will lay the predicate for that.

Q Mr. Smith, were you—did you report to the Fort—Fort Jackson?

Mr. Schimmel: We object to that. It is what the Local Board ordered, and that is all.

The Court: That is the sole question here.

Mr. Powell: We would like to except, and as a part of our exception is that he did report, we would like to ask further—

Q Mr. Smith, were you physically prevented by others over whom you had no control from reporting to the Draft Board on the morning in question?

A Yes, sir, I was.

Q State whether or not—just tell the Court what happened on that occasion.

A The date was September 30th, I believe, around September, 1943, and I was at my home in Columbia in the bath room shaving. While shaving I heard a commotion down stairs and opened the door to find out what was the trouble, and I noticed that there were three men coming up the steps.

Q Who did you learn that those three men were?

A I learned that one was a Magistrate, and with two Deputies.

Q And where were you told that they were from? Did you understand that they were from the Draft Board? What did they say?

A I understand that they were from the Draft Board.

Q Well, what did these three men say to you?

A They said that the Government had sent for me to take me out to Fort Jackson.

Q Did you ask for any authority for their coming for you?

A Yes; I asked if they had a warrant; and they said that they didn't need a warrant.

Q Did any of them have arms? Was there any show of arms?

A Yes, sir, there was.

Q Who was that?

A I believe it was the Magistrate himself. He displayed a pistol on the side.

Q Was that done to intimidate you?

A Yes, sir. He stepped and opened his coat up like that; and I saw that there was a pistol on his side.

Q And what did he say after that?

A He said, "Come on. Let's go. I will take you out to Fort Jackson."

Q And you went under his commands under those circumstances?

A Yes, sir, I did.

Q Did they put you in a car?

A Yes, sir.

Q Where did they carry you to?

A They first took me to the Provost Marshal's office at Fort Jackson.

Q Then what was done?

A I was then taken to the induction station at Fort Jackson.

Q Well, what was done with you there?

A I was turned over to a Sergeant at the desk of the Induction Station, and I was told—

Q By whom were you turned over to the Sergeant?

A By the Magistrate and two Deputies.

Q These three men that you have mentioned?

A Yes, sir.

Q Who took charge of you at that time?

A The Sergeant there at the desk.

Q What time of day was that?

A That was, I believe, between 8:30 and 9:00 o'clock.

The Court: You don't know what time it was?

Questions by Mr. Powell:

Q What date was that?

A I believe that was Thursday, September 30th or around about that time.

Q Was it before 9:00 o'clock?

A Yes, sir, it was.

Q What was done then, what did the officer do that took you in charge? It was an Army officer, was it not?

A Yes, sir, it was a Sergeant.

Q Sergeant who?

A I don't know his name.

Q Well, what did he do?

A I told him that I was a minister of the Gospel.

The Witness: I was a minister of the gospel, and because I knew that the Board was prejudiced against me, and they refused to give me a ministerial classification to excuse me, and that I was not to be inducted into the Army.

Q Did the Sergeant take your word for it?

A He took up the phone and called Local Board No. 68 and spoke to Mr. Leonard.

Q Could you hear him call?

A Yes, sir.

Q What did you hear him say?

A He asked if I was supposed to be inducted into the Army that day.

Q Now, Mr. Smith, what did he proceed to do with you after you heard that conversation?

A They proceeded to take me to a building to await the arrival of other members of Board 68.

Q What did he tell you, about Mr. Leonard, what did

Mr. Leonard have to say?

A He told me that Mr. Leonard said I was supposed to be inducted into the Army that day.

Q And did he say that he should send you back over to the Board to be transported back to Fort Jackson?

A No, sir.

Q State what he said.

A He said that Mr. Leonard said I was to report for induction that day, September 30th.

Q And did he state whether or not he should retain you there until the others arrived?

A He said I must await the arrival there of the others from the Local Board.

Q The others hadn't arrived?

A No, sir, they had not.

Q Was that a part of the conversation he related to you?

A Yes, sir. I was taken to the building to await the arrival of others from Local Board 68.

Q What happened when you were taken to this other building?

A The roll was called and my name was called, and all were to answer if they were present.

Q Did you answer present?

A Yes, sir, I did.

Q Was that by the same officer?

A No, sir, it wasn't.

Q Who called the roll?

A I do not recall the individual who did, but some one in charge.

Q He called the roll for the group of men that were there at the Induction Station?

A He was placed in charge of the selectees from the Local Board.

Q Now, then what took place then, Mr. Smith?

A We went through the physical examination.

Q You went through the physical examination?

A Yes, sir, I did.

Q Did the others go through the same physical examination that you did?

A Yes, sir, they did.

Q Then what took place?

A I was then told to wait at the side of the induction building there until my name was called, called again.

Q Was your name called?

A Yes, sir, it was.

Q Did you wait?

A Yes, sir, I did.

Q In obedience to that command?

A Yes, sir.

Q And then what took place?

A I was called over to the Army and Navy Building and asked my preference for the Army or Navy.

Q And what was your reply?

A I replied that I chose neither, that I was a minister of the Gospel and I was exempted from military service.

Q Did you make any statement about your being there?

A Yes, sir. I explained that I was brought out there against my will, and I explained that I was a minister and could not be inducted into the Army.

Q Well, what was done then?

A I was then called into another building where I was finger printed and questioned.

Q What questions were you asked?

A They were questions relating to my home and name and family.

Q And occupation?

A And occupation.

Q And what answer did you make to the questions?

A Well, I stated that I was a minister of the Gospel, and again that the Board was prejudiced against Jehovah's Witnesses and as a result they refused to classify me as a

minister, and I wanted to be released.

Q Then what was done, Mr. Smith?

A I was then called with the group of other—the same group over to another building for the oath of enlistment to be read.

Q Was the oath read?

A Yes, sir, it was read.

Q Were you there with the group to whom it was read?

A I was aside from the group.

Q Just state how it took place.

A Well, the officer there or Sergeant in charge explained that any one who—if there was any one present who desired not to take the oath to stand aside and raise their hand, and I did.

Q You did what?

A I raised my hand. And he said, "Step aside from the group."

Q What did you do?

A I stepped aside.

Q Were you the only one that stepped aside?

A No, sir. There was another person that did too.

Q Go ahead and tell what was said.

A The oath of enlistment was read to the group. I heard the oath. And I was given transportation back to the City of Columbia. I was given an order—

Q Just state—you said the oath of enlistment was read. Was anything else said?

A Yes, sir. I was given an order—

Q Was anything said about your stepping aside, anything said to those who stepped aside, you and any others?

A Yes. We were told that regardless of whether we took the oath of enlistment or not we would still be in the Army.

Q Did you take the oath?

A No, sir, I did not.

Q And he told you that you were still in the Army?

A Yes, sir, regardless of whether we took the oath or not.

Q Then what took place?

A We were then told—given an order to report back to the Reception Center.

Q Just a minute. Were you given any order before you were told that, given any pass?

A Yes. The Articles of War were read, quoted, in regard to absence without leave and desertion.

Q That was read to you only or the entire group?

A The entire group. And that if we failed to report we would be court martialled.

Q Were you then granted a leave?

A For twenty one days.

Q And you accepted that leave?

A Yes, sir, I did.

Q Where did you go on that leave, Mr. Smith?

A I went back home, to my home in Columbia.

Q When did you report back?

A At the end of twenty one days, at the time required.

Q How did you go out there, out to the Fort on this occasion?

A I was taken out there by an Army truck.

Q Had arrangements been made for this truck to pick you up on a certain day?

A Yes, sir.

Q And you were there to meet the truck?

A Yes, sir.

Q And went back to the Fort in that truck?

A Yes, sir.

Q Were you alone?

A No, sir.

Q How many were with you?

A Our names were called and there were approximately twelve others with me.

Q Were they the same that were present when the oath

was read?

A Yes, sir.

Q Did the driver transport you back to the Fort?

A Yes, sir.

Q What took place then?

A I was then taken to a building and further—there was further induction or further procedure.

Q Just tell what took place.

A I was taken to this building and waited for a period of time.

Q Were you in company of others?

A Yes, sir, I was. And during that time I requested to speak to the Lt. Col. in charge of the Reception Center to explain to him again that I was a minister of the gospel and, according to the Draft Law ministers of the Gospel were exempted from military service, and I knew that members of the Local Board were prejudiced against witnesses of Jehovah.

Q Did you submit any evidence?

A Yes, sir, I submitted sufficient evidence to prove that I was a minister.

Q Will you proceed and tell what took place?

A I went back through the procedure. I do not exactly recall all of it, but I remember the particular part where they were to issue the clothes for the Army, and I explained to the one in charge that I had previously spoken to the Colonel and said that I would refuse to put on the uniform, that I was a minister of the gospel and exempt from military service, and they said, "Oh, we will put it on you anyway." And after everybody had gone through the form of putting on military clothes there were five or six that tore my clothes off me and put the military clothes on me.

And I was taken to the military barracks, and I took off the clothes, and I spent that night in the barracks with no clothes and between two mattresses.

After that the next morning I was given an order to put on those clothes and told the penalty if I refused, and I again stated that I was a minister of the gospel and ministers were exempted from military service.

Later in the day my civilian clothes were brought back to me. And I stayed at this Reception Center for three weeks and three days, questioned by men and endeavoring to force me to put on the clothes against my will.

And I explained that I had a greater obligation to Almighty God and had to obey his law.

And I was taken to the Fort Stockade. And they proceeded to force the uniform on me again. I was thrown to the ground and the clothes taken off me and the uniform put on. And I was taken to what was known as the black box, with the door shut.

Q How long did you remain there?

A I remained there four days with no clothes and no food. Just water. At the end of four days the Articles of War were read to me concerning refusing to obey orders. And they told me that I would be court-martialed and may be get twenty or thirty years. And I again explained that I was a minister of the Gospel and had made a covenant with him to carry out his almighty will.

Q How did you get out of the Army, Mr. Smith?

A When it was seen that I was to be given a military court-martial a writ of habeas corpus was taken out to seek my release.

Q Were you released on the writ?

A Not in the lower court.

Q Were you court-martialed?

A Yes, sir. I was given a court-martial and sentenced to twenty five years.

Q And after that were you released on a habeas corpus as a result of your appeal to the Circuit Court of Appeals?

A Yes, sir.

Q How long did you stay at Fort Jackson all told?

A I stayed approximately six months.

CROSS EXAMINATION

Questions by Mr. Edens:

Q Where did you plan to go on the morning of September 30th?

A I planned to go to the U. S. Commissioner's office.

Q You had received your Order to Report for Induction on September 30th at 8:30, that is correct, isn't it, Mr. Smith?

A I received an Order. I don't know whether it came from the Local Board.

Questions by the Court:

Q Did you intend to obey it?

A Do I have to answer that?

Q Yes.

A No, sir, I did not.

Q You would not have reported anyway, is that what you said?

A I wasn't supposed to report.

Q I asked you would you have reported.

A No, sir, I would not.

The Court: What a man has in mind does not concern his intent as to whether it is wilful or not?

Questions by Mr. Edens:

Q At what stage did you propose to refuse to be inducted into the United States Army?

A I refused to take the oath.

Q Your Order said for you to report to your Local Board at 8:30?

A I understand it did, and they called at 9:00 o'clock.

Q Well, what time do you say now it was that they came by?

A I am not definite on the exact time, but I knew it was around 8:15 or 8:30, between 8:00 and 8:30. I could not tell you the exact time.

Q And didn't you tell the F.B.I. agent when he interviewed you that it was after 8:30 when those men came by?

A I don't remember whether it was or not.

LOUIS SMITH,

a witness for defendant, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by Mr. Powell:

Q Mr. Smith, were you at home on the morning of September 30, 1943, when three men came to your house?

A Yes.

Q Who were those men?

A It was Ollie Mefford, the Magistrate at Five Points, and those two deputies, but I do not know their names.

Q Don't know their names. What time did they come?

A 8:00 o'clock, I made a date with them for 8:00 o'clock.

Q Is that why you so definitely remember the time?

A Yes, sir.

Q Did you call for them to come out there, Mr. Smith?

A I did.

Q Just what did you do to arrange for them to come out?

A I knew that the boy wasn't going to report, and I wanted him to report, and I had been to several of the Draft Board officers; in fact, I went to Mr. Leonard.

The Court: It might lend something to the jurors' understanding if they knew what relation you are to the defendant.

The Witness: Well, I am his father. I went to Mr. Leonard. I knew that the boy wasn't going to report, and I wanted him to report, and I thought he ought to be in the Army. And I asked Mr. Leonard if there was any way we could arrange with the law or Draft Board to have that boy taken out to Camp Jackson. And Mr. Leonard said, "That boy could come out here and walk up and we could not touch him. We have no police power to take him out there. The only way you can get him out there is to take him in your car."

Questions by Mr. Powell;

Q Did he tell you that you could take him?

A He told me that I could take him. And in addition to that I went to see Col. Brice and I asked him if there was any way for me to get that boy out there, and he said, yes, so he got out there, but the Draft Board had no Police power whatsoever, because they could not make him go. I could, but they could not.

Q Just tell what happened.

A I was told that if the boy got out there it was all right, he would not have to report at the Draft Board, at that building where No. 68 is, and that I could make any arrangement I so pleased with any police power to get him out there, that they didn't have the authority to do it, the Selective and Training Law didn't have any police power. And not only he told me that, but Col. Brice told me that.

Q Who was he?

A He was an assistant to Gen. Springs at the Selective Service Headquarters. And Col. Brice told me that he didn't have any police power and that I would have to get him out there the best way I could.

I then went to Mr. Robert Wise, R. K. Wise, who is the agent for Draft Board 68, and who helped me a great deal in this situation, and Mr. Wise first told me that if I got

three men, or some men, not three necessarily, if I got those men to take that boy out there it would constitute induction into the United States Army.

And I did not know that he would not accept the actual going into the Army until he acted the way he did after he got out there.

Q Did they say that that would be acceptable to them?

A Yes; that is the impression that I got about the whole thing. He said he could walk about the Draft Board all he pleased and they would not lay a hand on him. And I said, "How do you get them out there?" And he said, "The Army truck comes in for them."

Q Then what did you do, Mr. Smith, what did you do after that?

A I went down to see Ollie Mefford, and Ollie Mefford agreed—in other words, I promised I would pay him something if he would do that, I offered him \$25., and he said that was all right, and to make it better I gave him \$30. And he said—he and the three men came out to my house at 8:00 o'clock on the morning of September 30th and took that boy to Camp Jackson.

Q And you were there when it happened?

A Yes, sir.

Q And you told the boy to go along with them?

A I told the boy to go along.

CROSS EXAMINATION

Questions by Mr. Schimmel:

Q And he told you that he wasn't going?

A Yes.

Q And it was because he told you that he wasn't going that you did all you could to get him to go?

A That is right.

Q And he has consistently taken that position that he would not be inducted into the armed forces?

A Yes, sir; but I did all I could to make him do it.

MRS. LOUIS SMITH,

a witness for defendant, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by Mr. Powell:

Q Do you know what time it was?

A It was 8:00 o'clock.

Q Will you tell what took place on that occasion?

A Well, I saw three men coming in the house, and I ran up the steps and by the time I got to the top of the steps they were behind me.

Q Did they say anything to you?

A No, I did not see them come in the door. And my son was in the bath room with the door locked, and he heard this noise and opened up.

Q Did he come down stairs?

A No, not then. He closed the door. And those men told him to come on out, the Government had sent for him. I said, "You go down those steps. He will come." And they stepped outside, went in the hall.

And he came down the steps and he asked those three men for the warrant, and they said that they had it in the car, and he said, "I would like to see it." And they said, "It is down"—they made some remark, and I said, "Let me see the warrant." And they said, "No, it is down in the Draft Board." And I said, "Son, don't give them any trouble."

Q Did you see any side arms at that time?

A I guess I did. I would not swear to that. I know it was there. I have heard it so much.

Q And what did they do, put him in the car and take him with them?

A One went in front of him and one behind him and they put him in the car and went off and I did not see him any more until 6:00 o'clock the next day.

Q And then did he come home?

A He came home and stayed for twenty one days and I took him down to the Draft Board and I did not see him any more until several days later.

Mr. Schimmel: We have no questions.

Motion for Directed Verdict

Mr. Cooley: If the Court please, the defendant moves for a direction of a verdict of not guilty on the ground that the evidence is not sufficient, there is no sufficient evidence upon which to convict.

And upon the further ground that as construed by the Court the law under which the defendant is charged is unconstitutional, in that it is a bill of attainder and a bill of pains and penalties and in that it denies the defendant due process of law.

Now, the way in which the facts have been presented here make it necessary that in our argument of the motion I cannot be quite as logical as I could if we had been permitted to bring out our full testimony, upon which we base our motion.

As to the insufficiency of the evidence, beginning with the Order to Report, there is no proof that a lawful order to report has been made by competent authority. Now, let's see what the proof is as to the Order to Report.

It was testified—I will put it this way, there was introduced in evidence a part of a file, Draft Board file of the defendant, showing the carbon copy of what was purported to be an Order to Report on Form 150, I presume that is.

Now, let's see what the Regulations—

The Court: That is Exhibit No. 2, Plaintiff's Exhibit No. 2!

Mr. Cooley: Yes, sir. Now, the Regulations as they stood at the time this happened, reads as follows: Section 633.1, dated 1-15-3, which was in effect until October 4th of that year, so that covers the period of time involved here. (Reads.)

They didn't file the copy of the sheet. There is no proof of what they mailed to the registrant. Mr. Leonard testified that that was a copy, carbon copy, but you notice it is not signed. Therefore, it is not an Order to Report. Three or four inclosures could be written out and filed in the office, but it would not be an Order until it was signed. Mr. Leonard said he did not know who signed it. He said it was the rule that a member of the Board would sign it or the Clerk. His testimony is from presumption. He has not proved in this particular instance that it was signed or by who.

Now, we get to the facts of the case. Our contention is that the man did report within the meaning of the Selective Training and Service Act and the Regulations. The object of the whole Selective Service process is to deliver a man to the Induction Center for induction into the Army, into the armed forces. The Supreme Court in the Billings case has said that a man has the right to exercise his choice at the Induction Station as to whether or not he will be inducted. In other words, there can be no forcible induction. His physical presence is necessary at the Induction Station in order to enable him to exercise that choice.

The Order, so-called, of the Local Board: (Reads from Order, beginning, "You will therefore report" and ending, "and Naval forces.")

Now, there could be no doubt about the man's physical presence at Fort Jackson. He reached there twenty minutes before the other selectees in the same group. At the time that this Order was issued a like Order was issued to other

men.

The Court: Do you take the position that a report not to be inducted is equivalent to a report to be inducted?

Mr. Cooley: Yes, sir, I take the position that under the Billings case he complies with the Order to Report when he goes to the Induction Center. It is then his choice to say whether he will be inducted or be prosecuted.

Mr. Cooley: Our position here as near as I can express it is that he reports, that he complies with the Law and Order and Regulations when he is physically present at the Induction Station at the time that the induction is being present at the induction process. Whether or not he goes through with it willingly is a matter for him, but he complies with the Order to Report when he is there.

The Court: In the Billings case they use this language: (Reads, beginning, "Under that view"—)

As far as I can make it he was ordered to report for induction. If he reports not to be inducted he has not complied with the law.

Mr. Cooley: If I understand you correctly, if you think, if your idea is that he must have an intention to go through with the process when he reports in order to comply with the Order to Report, I disagree with you.

The Court: You think all this man has to do is to report and walk off and he has violated no law?

Mr. Cooley: I think they should have prosecuted him for failure to submit to induction and not for failure to report. I do not think that they can prosecute him for but one. He could not refuse to submit to induction unless he was there at the time it was offered to him; and if he was there they could not prosecute him for not reporting.

The Court: It is not necessary for me to make a ruling of that sort. I hold that this Court has no jurisdiction in the trial of this case to review the action of any administrative

agency in reference to its classification and that he must accept classification and the Orders of the Draft Board to Report for induction.

Whether or not he has exhausted his administrative remedies he cannot secure a review of administrative action in a case of this character.

I am of the further opinion that there is sufficient testimony to go to the jury.

I do not think that the Act is unconstitutional.

However, I think there is proof of the classification and that there is also proof of the Notice to the defendant to report for induction.

Judge's Charge to Jury

Mr. Foreman and gentlemen of the jury, I desire to state to you at the outset of my charge just what the defendant is indicted for, because it is the indictment that frames the issue for your decision.

It is charged in this indictment that the defendant unlawfully, knowingly and wilfully failed and neglected to perform the duty which he was required to carry out under the provisions of the ~~Selective~~ Selective Training and Service Act of 1940, in that he being a resident of the County of Richland, State of South Carolina and within the jurisdiction of the Selective Service Local Board No. 68 of such County and State, having registered in accordance with the provisions of the Selective Training and Service Act and having been subject to such provisions and the Rules and Regulations promulgated and prescribed thereunder and being under the jurisdiction and subject to the orders of said Selective Service Local Board No. 68 and having been ordered by said Board to report for induction on the 30th day of September, 1943, failed, neglected and refused to report for induction as ordered by said Board. That is what the Government charges the defendant with having done in violation of law.

In 1940 the Congress of the United States, exercising its legislative functions, passed an Act, which shortly thereafter went into effect, commonly called the Selective Training and Service Act of 1940. It will not serve a useful purpose for me to read the entire text of this Act, but it is appropriate that I draw your attention to certain provisions of that Act, which I will now proceed to do.

It is said in this Act, and I am quoting, Sec. 2, Registration in general, "Except as otherwise provided in this Act, it shall be the duty of every male citizen of the United States, and of every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and sixty-five, to present himself for and submit to registration at such time or times and place or places, and in such manner and in such age group or groups, as shall be determined by rules and regulations prescribed hereunder."

And additionally the Act prescribes as follows, and I am quoting again: Sec. 3 Training and Service in general. (a) "Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of eighteen and forty-five at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States."

Skipping over a part of that section, I take up again, quote: "The President is authorized from time to time, whether or not a state of war exists, to select and induct into the land and naval forces of the United States for training and service, in the manner provided in this Act, such number of men as in his judgment is required for such forces in the national interest." That ends that quote.

It is otherwise provided by Act of Congress, gentlemen of the jury, that rules and regulations for carrying into effect this particular Act may be promulgated and that

they shall have the force and effect of law and, as you will see later by certain regulations that I shall read to you, the form prescribed by competent authority under this Act shall become and have the effect of a rule or regulation as used, in the sense as used in the Act.

I quote further from the Act: Sec. 11. Penalties. "Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the Rules or Regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty," skipping over a part and taking up and quoting that again, "or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act . . . shall, upon conviction in the district court of the United States having jurisdiction thereof," that ends the quote, be punished by fine or imprisonment or both.

In order to carry the Act into effect there have been promulgated from time to time certain rules or regulations which have the force and effect of law, as you have heard from the reading of portions of the Act, but it will serve no useful purpose to read in your presence all of those rules and regulations, because a great many of them have no application to the controversy now before you for settlement.

I do desire to read to you one of the rules or regulations denominated Section 605.51. It reads as follows: "All forms and revisions thereof referred to in these or any new or additional regulations, or in any amendment to these or such new or additional regulations, whether heretofore or hereafter adopted, and all forms and revisions thereof heretofore or hereafter prescribed by the Director of Selective

Service shall be and become a part of these regulations in the same manner as if each form, each provision therein, and each revision thereof were set forth herein in full. Whenever in any form or the instructions printed thereon, whether hertofore or hereafter adopted or prescribed, any person shall be instructed or required to perform any act in connection therewith, such person is hereby charged with the duty of promptly and completely complying with such instruction or requirement."

I also call to your attention and read to you regulation bearing No. 633.1: "Immediately upon determining which men are to report for induction, the local board shall prepare for each man an Order to Report for Induction (Form 150), in duplicate. The local board shall mail the original to the registrant and shall file the copy in his Cover Sheet (Form 53)."

Now, Mr. Foreman and Gentlemen of the Jury, as stated to you, the Government charges that this defendant, being a resident and having been classified, was ordered to report for induction on September 30, 1943, that he wilfully and knowingly failed to perform his duty in that respect by reporting for induction.

Now, Gentlemen of the Jury, a person may be said to have knowingly and willfully done something or to have failed to have done something when he is conscious of and knows of the duty to do that which is required of him or of his duty not to do that with which he is charged.

Willfullness in law is said to be a conscious doing of something that the party guilty of the act knows should not be done or the conscious failure to do something which one knows he should do.

In this case the defendant is charged with knowing that he was required by his local board having jurisdiction over him to report at a certain time for induction into the Army and that, with knowledge of that requirement and with no intention to perform it, he stayed away and did not do that

which was required of him. Now, that is the gist of it, the charge against him.

Now, something has been said in this case about the defendant being restrained. I charge you that a person who is required to do something, if he is prevented from doing that through no fault of his own, if some outside force which he cannot control intervenes to prevent him from performing his duty, that would be a good defense so long as the restraint exists, but it would not relieve of the duty and responsibility of performing said duty when the restraint was removed.

Now, it is a question of fact for you in view of all of the testimony in this case, the testimony of the defendant and the testimony of the other witnesses, as to whether or not any physical restraint had anything to do with his not reporting for induction.

In other words, if it is my duty to go down in front of this Court House at a given hour, and before and at the time it is my duty to go I have no intention of doing so and would not do so, the mere fact that somebody may have laid hands on me and held me temporarily might have nothing in the world to do with my absence in front of the Court House where I was supposed to go, but if it did, if I decided that I would not go, and then changed my mind and decided I would go, then my duty called me there as soon as that restraint was removed.

Now, something, Gentlemen of the Jury, has been said in argument about the fact that a selectee or inductee might be rejected after he reported for induction. And so he might. But that does not operate to relieve the selectee or inductee from the duty of reporting for induction. If it did, the law would mean that only those who wanted to go would go and those who did not want to go would not go.

I charge you that regardless of whether he would or would not have been rejected as unfit for the service, it was the duty of the defendant under the Order to report,

which he admits that he received to report.

I charge you further, Gentlemen of the Jury, that the law has set up a method to determine who is and who is not subject to this Act and subject to conform. You and I in a case of this character must accept that determination as final. We have no authority, neither you nor I, to go behind it. There are other methods provided to protect, methods declared by law to be adequate to protect, the inductee or selectee in his rights.

So if you find from the record in this case that this defendant had been classified by his Local Board, and pursuant to that classification he had been called to report for service, I charge you that it was his duty to report for induction.

Neither you or I have a right to question the judgment and conclusions reached by the Draft Board or any Appeal Board that had jurisdiction in this case. That has already been settled once.

Now, Mr. Foreman and Gentlemen of the Jury, when a defendant is brought into this Court charged with a criminal offense, he comes into the Court with a presumption of innocence, and the Government which affirms his guilt has the burden of proving his guilt, not by mere preponderance of the evidence but beyond a reasonable doubt, sometimes interpreted to mean to a moral certainty.

A moral certainty is not an actual certainty. If that were the law, no person would ever be able to sit on a jury and convict one charged with crime who was not a witness to the crime, and every defendant who could avoid having witnesses on the jury when he committed his crime would always escape.

I am sure that you gentlemen have from time to time heard the expression, "I am sure of that to a moral certainty." It may be that the person speaking didn't see the thing that he is sure of or he didn't hear it or he didn't feel it, but he was morally certain it was true because of

evidence that had come to him which he believed creditable. Believing it, then he would say he was sure of it to a moral certainty.

You go home and meet your wife at the front door and she would say to you, "The boy or the daughter is in bed sick." You haven't seen them, but if you believed your wife you would be morally certain of it. That is what I mean, that character of testimony that you hear or that character of evidence that you see in the record which brings home to you a conviction of the truth of some matter in controversy.

Now, a reasonable doubt. People have tried to define it. I have often thought that when you come to define a reasonable doubt you may create more confusion than clarity. You as reasonable men know what it means. You do things for reasons or you refrain from doing something for a reason or reasons. Now, you can say that you have a reasonable doubt of somebody's guilt when you have that character of doubt for which you can give a reason. It is not a flimsy doubt or a fanciful doubt.

Some addle brain might say that he doubted that the sun would ever shine again or that we would ever see in this country the water falling from the skies in rain or that he doubted that the moon or the stars would ever appear again in the Heavens. That is a flimsy fanciful doubt. It is not that kind of doubt that we deal with, but the doubts we deal with are substantial, doubts that grow out of the testimony or evidence or the lack of it, either one or the other.

Mr. Foreman and Gentlemen of the Jury, a number of Requests to Charge have been submitted, the first four of which deal with the subject of reasonable doubt. I think I have sufficiently covered that, except to say to you that if you do entertain a reasonable doubt of this defendant's guilt, it would be your duty to find him not guilty or, to state it the other way around, if you are not convinced of

his guilt beyond a reasonable doubt you would not be warranted in convicting him.

Defendant's Requested Instructions

The Defendant's Sixth Request:

"Defendant is charged with having violated the Selective Training and Service Act of 1940 in that he is said to have 'knowingly, wilfully and unlawfully' failed to submit to induction."

[By the Court:]

He is charged, Gentlemen of the Jury, not with failure to submit to induction in terms but with failing to report for induction. I make that qualification of that Request.

Now, continuing with the Request:

"The word 'knowingly,' as used in criminal statutes, means that at the time of the committing of the offense the defendant must have known what he was doing, and with such knowledge proceeded to commit the offense charged. As used in the Selective Training and Service Act of 1940 it is distinguished from innocently, ignorantly or unintentionally,"—

I stop on that comma.

(The balance of the sentence, which was not read, is as follows: "And does not merely mean voluntarily or unintentionally")

I think I have already charged you that, gentlemen. He is in effect charged with the conscious failure to perform a duty.

Taking up the quotation again:

"It means prompted by bad faith or with an evil intent or for a bad purpose."

I charge you, Gentlemen of the Jury, it makes no difference what his purpose was, if he deliberately and intentionally neglected to perform a duty required of him under the law, knowing that it had been required, for that would meet the requirement of the law.

Picking up the Request to Charge again:

"The word 'unlawful' means that which is done in an unlawful manner in violation of laws, rights and duties. It almost means without legal justification."

I may add right there, Mr. Stenographer and Gentlemen of the Jury, that it does not almost mean a legal justification, it does mean that, because if there is legal justification there is no violation of law.

Reading further:

"If the defendant had legal justification for his acts they could not be unlawfully done."

Why, of course not. "In other words the term 'unlawful' implies that the act was not done as the law recognized. The burden is upon the Prosecution to prove that the defendant failed to perform a duty required of him under the Act."

That is right. As modified I charge you that Request.

("Defendant's Requested Instruction No. 9

All persons between the ages of 18 and 45 are subject to the Selective Training and Service Act of 1940 and are liable for training and service thereunder at such time and in such manner as the Selective Service System may prescribe for him unless he is exempt from all training and service by the Act itself. The only persons exempted by Congress from training and service are "regular or duly ordained ministers of religion and students preparing for the ministry." (Sec. 5 (d)) If a registrant is a "regular or duly ordained minister of religion" within the meaning of the Act and Regulations at the time of his registration and classification, he has no duty to submit to training or render services under the Act and the local draft board has no authority to order him to do training and service under the Act. Unless you can find beyond a reasonable doubt that he had a duty and that he was not a minister of religion you cannot convict.")

("Defendant's Requested Instruction No. 10

If the jury find that the defendant, in pursuance of the order of the local board, was present at the induction station at the time fixed by the board and while there underwent the examination and other procedure with the other selectees and obeyed the orders of the military authorities while there, and participated in the induction ceremony, even though he may have refused to be inducted, I charge you that in contemplation of law he reported for induction and cannot be convicted for a failure to report for induction.")

. . .

("Defendant's Requested Instruction No. 27

If you find from the evidence or have a reasonable doubt thereof that the defendant submitted to the local board before classification proof that he is and was a "regular minister" of Jehovah's witnesses and that the draft boards had no substantial evidence or proof disputing such claim and arbitrarily and capriciously failed to consider the proof given them by defendant that he was a "regular minister" of Jehovah's witnesses, then you will acquit the defendant and by your verdict say 'not guilty.'")

. . .

And I charge so much of the Defendant's Request No. 40 as I now read to you, which is the first half of it:

"You are instructed that although you may not be permitted to inquire into or judge the validity or the invalidity of the classification by the draft boards given to the defendant nor can you say whether or not the draft boards were wrong in classifying him, you must and will, however, consider all of the defendant's testimony given as his reasons for not reporting for induction in determining whether or not he knowingly and unlawfully failed to report for induction."

So much as I have read I charge you, Gentlemen of the Jury, that it is a good instruction. The remainder of the

request is refused, and around the remainder I have marked so as to indicate the part that I have refused. Only the part I read is charged.

(The portion of Request No. 40, refused by the Court and not read, is as follows:

"If you find and believe from the evidence, or have a reasonable doubt thereof, that the defendant, at the time he failed to report for induction, honestly and in good faith believed that he was exempt as a minister of religion under the Act and Regulations from training and duty under the Act on the basis of his actual occupation and activity as a minister and thereby honestly believed that the Act was not applicable to him and that the order did not have to be complied with by him, you will acquit the defendant and by your verdict say, 'not guilty.'")

Now, Mr. Foreman and Gentlemen of the Jury, you go to your jury room and you will have with you this Indictment and you will carry with you the exhibits so that you may refresh yourselves as to the contents of those exhibits.

I wish to say to you that it is your duty to consider and compare all of the testimony in this case. It is your prerogative to believe or disbelieve the testimony of any witness. It is also your prerogative to accept part of the testimony of any witness and reject another part.

I think you will find in the course of the development of this case that there is practically no difference as to the facts. However, you are not to take my recollection on that, but your recollection, because you are the sole judges of the facts, and that is your responsibility and not mine.

The particular issue as to the facts, it seems to the Court, arises out of the interpretation that is to be placed upon facts, most of which is conceded.

This case, Mr. Foreman and Gentlemen of the Jury, deserves and is entitled to receive at your hands the same earnest, faithful and constant consideration that is ac-

recorded in every case. Every defendant charged with crime in this Court, whether his station in life is high or low, is entitled to the honest judgment of an honest juror upon every legitimate fact and issue, or, rather, upon every fact that is legitimately an issue. That is true in this case just as it is true in all cases.

Consequently, the jury is not charged with any duty or responsibility for the effect or punishment. That responsibility falls upon the Court when the verdict of the jury has been rendered as to the facts.

What I want to impress you with on your part is to settle the issues of fact; and if settlement of the issues of fact calls for punishment or if it calls for turning the defendant loose, you have discharged your duties when you have returned a true verdict. You are not responsible for the consequences.

If this defendant is not guilty, you will say "Not guilty" in the form of your verdict; but if you believe that he is guilty, you will say "Guilty" in the form of your verdict.

I hardly think it is worth while to take the time to review the testimony in this case, as I might, because, as I have already said to you, it covers such a narrow issue that I am quite sure that every member of the jury can remember practically everything that was testified to and, certainly, as to the record evidence you will have the highest evidence of what that was with you in the jury room.

Now, Mr. Foreman and Gentlemen of the Jury, there are two forms of verdict that you can return in this case. One is guilty and the other is not guilty.

If you are satisfied of the defendant's guilt by the measure of proof that I charge you, that is, beyond a reasonable doubt, then the form of your verdict will be "Guilty."

If you have a reasonable doubt whether the defendant is guilty as charged, then the form of your verdict will be "Not guilty."

It takes all twelve of you gentlemen to return a verdict

of "Guilty" or "Not guilty."

On the back of the Indictment, which I shall hand to you, Mr. Foreman, you will find these words, "We, the jury, find the defendant Louis Dabney Smith blank this blank day of November 1944. Now, in that first blank you will write either "Guilty" or "not guilty", depending upon which verdict you agree upon. When you have done that, if you do agree, then write the date in the blank provided for that purpose, and write your name on the blank line above the word "Foreman," and notify the Marshal that you have agreed.

Mr. Powell: The defendant respectfully excepts to the Court's charge: First, on failure to charge the part of Requests No. 5 and No. 6 as given, and No. 7, and for not giving charges 8 to 39, inclusive, and for not charging the remainder of 40. Also for not charging 41 to 44, inclusive.

The Court: In other words, you are excepting to the failure of the Court to charge the requests in the form requested. All right, let the exception be noted.

Give the jury the exhibits and the Indictment.

Mr. Powell: There was one statement, as I understood it, in your charge where the Court said, "knowingly and wilfully," and then followed that up with, "to be conscious of not being a duty." It seems that on the condition and the statement of, "to be conscious of," could include a person was physically restrained and unable to comply.

The Court: "Knowingly" would also include that case. And for that reason I went on to explain the exceptions to that later on, that if the man was physically restrained, that so long as the restraint existed he could not be held for a failure to perform.

Mr. Powell: And then the explanation of the illustration given by the Court regarding the requirement to go to the front of the building, the explanation was that, as I remember it, that if I had no intention to do so, it would not affect—have any effect upon my going if I was restrained, or

something to that effect.

The Court: I meant to say, and think I did say, if I was required to go to the front of the building, had no intention of going there before the time ~~or~~ at the time, although somebody might have put their hands upon me physically and held me, and that had nothing to do with preventing my absence, then it would not excuse me.

Mr. Cooley: Your Honor please, the point we want to call your attention to is that the defendant himself, in order to be guilty of the failure, he must be able to perform.

The Court: That is a matter for the defense. The Government does not have to prove that he is able to perform. He has offered no evidence that he wasn't able to perform other than that about which I have charged.

Mr. Powell: There is one other feature beside that, may it please the Court, I respectfully except to, and that is this, as I remember the Court said there are other methods provided to protect registrants, and it would seem that the jury upon that statement might reach the conclusion that it would not be necessary for him to be protected now by a favorable judgment, but that he would have other methods later provided for his protection.

The Court: Well, I think I stated to them that we could not review what the Draft Board did or the competency of its classification and all of those preliminary steps, because the law has provided other methods of making those determinations. I think that is right. I excluded that from the consideration of the jury.

Anything further?

The jury then retired to its room and later returned the following verdict:

(We, the jury, find the defendant Louis Dabney Smith guilty this 10th day of November, 1944.

J. S. Rodgers, Jr., Foreman.

**IN UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT**

Appendix to Brief of Appellee

ORDER TO REPORT FOR INDUCTION

Prepare in Duplicate

Local Board Number 68

47

1316 Washington St.

079

Columbia, Richland County

South Carolina

068

18 September, 1943.

The President of the United States, To Louis Dabney
Smith. Order No. 14022

GREETING:

Having submitted yourself to a local board composed of your neighbors for the purpose of determining your availability for training and service in the land or naval forces of the United States, you are hereby notified that you have now been selected for training and service therein.

You will, therefore, report to the local board named above at Columbia, S. C., at 8:30 A. M., on the 30th day of September, 1943.

This local board will furnish transportation to an induction station. You will there be examined, and, if accepted for training and service, you will then be inducted into the land or naval forces.

Persons reporting to the induction station in some instances may be rejected for physical or other reasons. It is well to keep this in mind in arranging your affairs, to prevent any undue hardship if you are rejected at the induction station. If you are employed, you should advise your employer of this notice and of the possibility that you may not be accepted at the induction station. Your employer can then be prepared to replace you if you are accepted, or to continue your employment if you are rejected.

Willful failure to report promptly to this local board at the hour and on the day named in this notice is a violation

of the Selective Training and Service Act of 1940, as amended, and subjects the violator to fine and imprisonment.

If you are so far removed from your own local board that reporting in compliance with this order will be a serious hardship and you desire to report to a local board in the area of which you are now located, go immediately to that local board and make written request for transfer of your delivery for induction, taking this order with you.

— — —, Member or clerk of the Local Board.

(Signed by member or clerk of Local Board No. 68.)

EXCERPTS FROM TESTIMONY

Excerpts from Testimony of Paul H. Leonard, Clerk of Local Board No. 68, Richland County, Columbia, S. C.

Q. Did he report on the 30th of September pursuant to instructions in the Order mailed to him on the 18th of September?

A. No, sir.

Q. How do you know that he did not report?

A. Because I went out to the truck in Columbia. Government transportation was furnished by the Local Board to the Fort. And I had his name together with two other names to determine whether he did report, and he did not answer, and the truck left the office, and he wasn't at the office and didn't report as ordered.

Q. And the Order read for him to report at 8:30 on the morning of the 30th, is that correct?

A. Yes, sir; at the office of the Local Board to the Local Board on the 30th of September, 1943.

Cross-examination:

Q. Did you talk to him (Defendant's Father) prior to the date of induction?

A. Yes.

Q. Did you talk to him relative to the induction of his son?

A. Yes.

Q. Did you tell him that if he carried him out to the Fort or had him carried out it would be proper and all right with your Board?

A. No. . . .

Q. Were any members of the Board present when this conversation with Mr. Smith took place?

A. No.

Q. None were there at that time?

A. No.

Q. Did you receive any direction from the Board as to any arrangement made with Mr. Smith to carry his son to the induction station instead of bringing him to the Board?

A. No.

Q. Nothing was said to you concerning that by any member of the Board?

A. That is right. Nothing was said to me by any member of the Board.

Q. Mr. Leonard, will you state whether or not it is customary for you to allow some to report to the induction center without receiving transportation from the Board?

A. No, sir.

Q. Do you recall any instance in which this has been done?

A. They are called to the Board, and in some instances a selectee has arranged with the Sergeant who comes for them in Government trucks to go out in his own automobile, but the Draft Board has nothing to do with that. It has brought about so much confusion that they do that no more.

Q. But that was the practice back some time ago, wasn't it?

A. That was just exceptional cases.

Q. But there are exceptional cases where that was permitted?

A. That was permitted by the Sergeant who came for them, not the Draft Board. He was present at the board.

EXCEPTS FROM TESTIMONY OF LOUIS DABNEY SMITH,
DEFENDANT

Q. What was done then, what did the officer do that took you in charge? If was an Army Officer, was it not?

A. Yes, sir, it was a sergeant.

Q. Sergeant who?

A. I don't know his name.

Q. Well, what did he do?

A. I told him that I was a minister of the Gospel.

Mr. Edens: We object to what he told the Sergeant, your Honor.

The Court: Let him tell what he did.

The Witness: I was a minister of the gospel, and because I knew that the Board was prejudiced against me, and they refused to give me a ministerial classification to excuse me, and that I was not to be inducted into the Army.

Q. And then what took place?

A. I was called over to the Army and Navy Building and asked my preference for the Army or Navy.

Q. And what was your reply?

A. I replied that I chose neither, that I was a minister of the Gospel and I was exempted from military service.

Q. Did you make any statement about your being there?

A. Yes, sir. I explained that I was brought out there against my will, and I explained that I was a minister and could not be inducted into the Army.

Q. Well, what was done then?

A. I was then called into another building where I was finger printed and questioned.

Q. What questions were you asked?

A. They were questions relating to my home and name and family.

Q. And occupation?

A. And occupation.

Q. And what answer did you make to the question?

A. Well, I stated that I was a minister of the Gospel, and again that the Board was prejudiced against Jehovah's Witnesses and as a result they refused to classify me as a minister, and I wanted to be released.

Q. Then what was done, Mr. Smith?

A. I was then called with the group of other—the same group over to another building for the oath of enlistment to be read?

Q. Was the oath read?

A. Yes, sir, it was read.

Q. Were you there with the group to whom it was read?

A. I was aside from the group.

Q. Just state how it took place.

A. Well, the officer there or Sergeant in charge explained that any one who—if there was any one present who desired not to take the oath to stand aside and raise their hand, and I did.

Q. You did what?

A. I raised my hand, and he said, "Step aside from the group."

Q. What did you do?

A. I stepped aside. . . .

Cross-examination.

Questions by Mr. Edens:

Q. On the morning of September 30th, Mr. Smith, what did you propose to do that morning?

Mr. Powell: I object to that. I object to the form of the question.

The Court: Objection overruled.

Questions by Mr. Edens:

Q. Where did you plan to go the morning that the men came for you?

Mr. Powell: I object to that.

The Court: Objection overruled. I have already overruled it once.

Mr. Powell: It is not the same question.

The Court: No, it is a different question.

The Witness: Is it necessary for me to answer this question?

The Court: Yes. Go ahead.

Mr. Powell: Does the defendant have to answer questions if they violate his Constitutional right?

The Court: He has offered himself as a witness and is subject to cross-examination and the same rules apply to him as to any other witness.

Mr. Powell: We object to the ruling of the Court.

The Court: All right.

Mr. Powell: On the ground that he has a right to refrain from answering any question that he thinks would violate his Constitutional rights.

The Court: It is a novel objection and it is overruled. Go ahead.

Questions by Mr. Edens:

Q. I have asked the question twice. Will you answer it, sir?

A. Will you repeat it?

Q. Where did you plan to go on the morning of September 30th?

A. I planned to go to the U. S. Commissioner's Office.

Q. You had received your order to Report for Induction on September 30th at 8:30, that is correct, isn't it, Mr. Smith?

A. I received an Order. I don't know whether it came from the Local Board.

Q. You know what it said?

Questions by the Court:

Q. Did it purport to come from the Local Board?

A. Yes, sir.

Q. Did you have any doubt about it coming from the Local Board?

A. No, sir.

Q. Did you intend to obey it?

A. Do I have to answer that?

Q. Yes.

A. No, sir, I did not.

Q. You would not have reported anyway, is that what you said?

A. I wasn't supposed to report.

Q. I asked you would you have reported.

A. No, sir, I would not.

Q. So that didn't keep you from reporting?

Mr. Powell: We object to those answers and questions too on the ground that that isn't related to the question at issue. What he did is related to the question. A man might — his actions is what would determine the question in this case.

The Court: Objection overruled.

Mr. Powell: Exception.

The Court: Yes, note an exception.

Questions by Mr. Edens:

Q. After you arrived at the Fort did you at any time propose to submit yourself for induction into the United States Army or did you do anything —

Mr. Powell: I object to that on the ground that this witness is not being charged with the refusal to be inducted, but the charge is merely reporting, and it really has no bearing on the issue.

The Court: It seems to me that the counsel for the witness or defendant has undertaken to develop a line of testimony upon which they expect to predicate a plea that he has already reported for induction, and, in fact, the counsel has already made that statement in open court, and I think he may be cross-examined along that line.

Mr. Powell: May it please the Court, the basis of our objection is this, is that his action is what counts, what he did, on this occasion is relevant, but what he had in his mind is not relevant, that his actions must determine the entire question at issue.

The Court: What a man has in mind does not concern his intent as to whether it is wilful or not?

Mr. Powell: No, sir.

The Court: Objection overruled.

Mr. Powell: Exception.

Questions by Mr. Edens:

Q. Did you at any stage of the proceedings after you arrived at Fort Jackson propose to submit to induction into the United States Army?

Mr. Powell: I object to that, may it please the Court.

The Court: All right. Overruled.

The Witness: At any stage?

Mr. Edens: Correct.

A. Yes, sir.

Q. At what stage did you propose to refuse to be inducted into the United States Army?

A. I refused to take the oath.

Q. At any stage did you propose or plan or agree or intend to submit to induction into the Army?

Mr. Powell: I object to the form of the question. Nothing definite about that. It is too indefinite.

Questions by Mr. Edens:

Q. Or intend then, did you or not?

Mr. Powell: That calls for a mental state of mind too.

The Court: Objection overruled. Go ahead, answer it.

Questions by Mr. Edens:

Q. Did you intend or agree at any stage of the proceedings at Fort Jackson after you arrived there to submit to induction into the United States Army?

A. No, I did not intend to.

Q. At any time you did not ever intend to, did you, Mr. Smith?

A. No, sir, I did not.

Mr. Powell: We object to that on the same ground.

The Court: Objection overruled.

Mr. Powell: Exception reserved. If it please the Court, I would like to state this as a part of my exception, a person may intend one thing at one minute and an entirely different thing at another moment, and mere intention only, not coupled with a course of action, could not determine the matter in question.

Mr. Edens: My question was directed at any time.

The Court: I don't want any argument. The question is overruled.

Questions by Mr. Edens:

Q. Mr. Smith, you knew and now know that at the time the men came by for you at your home on the morning of September 30th it was after the time you were supposed to have reported to your Local Board?

A. No, sir, it was not.

Q. Your Order said for you to report to your Local Board at 8:30?

A. I understand it did, and they called at 9:00 o'clock.

Q. You didn't bother to read the Order from the Local Board?

A. Yes, sir, I did.

Q. Have you got it with you?

A. No, sir.

Q. Has your counsel got it?

A. I don't know.

Q. Do you know that your Order did read report at 8:30?

A. I was mistaken.

Q. Did you intend to report at 9:00 o'clock to your Local Board?

A. No, sir.

Questions by the Court:

Q. Well, was it after 8:30 when the men came to your home?

A. No, sir; it was before.

Questions by Mr. Edens:

Q. Well, why did you say it was between 8:30 and 9:00 that they came?

A. Because I thought the order to report was at 9:00 o'clock for induction.

Q. And you said the time that they came was before 8:30 and 9:00?

A. Yes, sir; it was.

Q. Well, what time do you say now it was that they came by?

A. I am not definite on the exact time, but I knew it was around 8:15 or 8:30, between 8:00 and 8:30. I could not tell you the exact time.

Q. What is that you have in your hand?

A. That is the Holy Bible.

Q. Have you ever told anybody else it was 8:15 that those men came by?

A. I don't know.

Q. And didn't you tell the F. B. I. agent when he interviewed you that it was after 8:30 when those men came by?

A. I don't remember whether it was or not.

Q. Well, you don't know that when the F. B. I. agent came by you told him that it was between 8:30 and 9:00 that they came for you?

A. I do not remember what I told him; but it was prior to the time to report for induction. How much, I don't know.

Q. That is your signature, isn't it?

A. Yes, sir, it is.

Q. Is that your handwriting?

A. No, sir.

Q. That is not your handwriting?

A. No, sir.

Q. But you did sign this statement?

A. Yes, sir, I did.

Q. Do you mind reading this portion relating to your statement with reference to the time the men came by, from here to right through the portion relating to the time?

A. "I received an Order to report to the Local Board 68 at Columbia, S. C. on September 30, 1943. I did not intend to report for induction on that date. However, I did intend to go see the United States Commissioner Sloan to explain the reason why I would not report on the morning of Sep-

tember 30, 1943." etc. * * * "and took me to the Provost Marshal's Office."

Q. That is enough. That was your statement shortly after this occurred, that was your statement on May 16, 1944?

A. Yes, sir. It was.

Q. And you did refuse to take the oath when it was administered by the proper officer at the Induction Center?

The Court: He has already said that. You need not go over it. He said he stood aside and would not take it.

Excerpts from Testimony of LOUIS SMITH, Father of Defendant:

Cross-examination:

Q. Mr. Smith, you thought it was the boy's place in the United States Army?

A. I thought he should go.

Q. Along with other United States citizens?

A. Yes, sir.

Q. And he told you that he wasn't going?

A. Yes.

Q. And it was because he told you that he wasn't going that you did all you could to get him to go?

A. That is right.

Q. And you felt as an American citizen and his father it was your duty to take him out?

A. Yes, sir: that is why I did it.

Q. And you thought if you got him there he would take the oath as a soldier?

A. Yes, sir.

Q. And he refused to take the oath?

A. They told me that he didn't. * * *

SELECTIVE SERVICE FORMS

605.51. Forms made part of regulations. (a) All forms and revisions thereof referred to in these or any new or additional regulations, or in any amendment to these or such new or additional regulations, whether heretofore or hereafter adopted, and all forms and revisions thereof heretofore or hereafter prescribed by the Director of Selective Service shall be and become a part of these regulations in the same manner as if each form, each provision therein,

and each revision thereof were set forth herein in full. Whenever in any form or the instructions printed thereon, whether heretofore or hereafter adopted or prescribed, any person shall be instructed or required to perform any act in connection therewith, such person is hereby charged with the duty of promptly and completely complying with such instruction or requirement.

[fol. 59] PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT

No. 5329

LOUIS DABNEY SMITH, Appellant,

VERSUS

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the
Eastern District of South Carolina, at Columbia

November 28, 1944, duplicate notice of appeal is filed and
the cause is docketed.

Memo. of Clerk: The notice of appeal appears on page 14
of the complete transcript of record and is, therefore,
omitted here.

Same day, clerk's statement of docket entries is filed.

Same day, the appearance of Curran E. Cooley and
Grover C. Powell is entered for the appellant.

December 5, 1944, the appearance of Henry H. Edens,
Assistant U. S. Attorney, is entered for the appellee.

December 15, 1944, certified copy of order extending time
for filing bill of exceptions and assignment of errors is filed.

Memo. of Clerk: This order appears on page 17 of the
complete transcript of record and is, therefore, omitted
here.

January 27, 1945, the transcript of record is filed.

Same day, the original exhibits are certified up.

February 8, 1945, the appearance of Louis M. Shimel,
Assistant U. S. Attorney, and Irving S. Shapiro, Attorney,
Department of Justice, is entered for the appellee.

[fol. 60] Same day, the appearance of Hayden C. Covington
is entered for the appellant.

Same day, statement under section 3 of rule 10 is filed.

February 16, 1945, notice of and motion of appellant for
extension of time to file brief and appendix are filed.

ORDER EXTENDING TIME FOR FILING BRIEFS AND APPENDICES—
Filed February 19, 1945

[Style of Court and Title omitted]

Upon the Application of the Appellant, by his counsel, and for good cause shown,

It Is Ordered that the time for the filing of the Appellant's brief and appendix in the above entitled cause be, and the same is hereby, extended to and including February 28, 1945, and that the time for the filing of the Appellee's brief and appendix be, and the same is hereby, extended to and including March 9, 1945.

February 17, 1945.

John J. Parker, Senior Circuit Judge.

February 23, 1945, appendix to brief of appellant is filed.

February 28, 1945, brief on behalf of the appellant is filed.

March 9, 1945, brief and appendix on behalf of the appellee are filed.

ARGUMENT OF CAUSE

March 12, 1945 (March term, 1945), cause came on to be heard before Parker, Soper and Dobie, Circuit Judges; and was argued by counsel and submitted.

[fol. 61]

OPINION—Filed April 4, 1945

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5329

LOUIS DABNEY SMITH, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Columbia

(Argued March 12, 1945. Decided April 4, 1945)

Before Parker, Soper and Dobie, Circuit Judges

Hayden C. Covington (Curran E. Cooley and Grover C. Powell on brief) for Appellant, and Louis M. Shimel, Assistant U. S. Attorney; Irving S. Shapiro, Attorney,

[fol. 62] Department of Justice, and Henry H. Edens, Assistant U. S. Attorney, (C. N. Sapp, U. S. Attorney, and Nathan T. Elliff, Special Assistant to the Attorney General, on brief) for Appellee.

PARKER, Circuit Judge:

This is an appeal from a conviction and sentence under an indictment charging violation of the Selective Training and Service Act of 1940, 50 U. S. C. A. Appendix sec. 301 et seq., in failing to report for induction pursuant to the order of a local draft board. Defendant is a member of the sect known as Jehovah's Witnesses and claims exemption from the provisions of the Act on the ground that he is a minister of religion. This claim was denied by the local board and he was classified 1-A and ordered to report for induction. The appeal presents two questions: (1) whether the trial court erred in refusing to direct a verdict for defendant on the facts relating to the refusal to report, and (2) whether the court erred in excluding evidence as to the ministerial status of defendant. Both questions, we think, must be answered in the negative.

The facts with respect to defendant's failure to report are as follows: Defendant was ordered by the draft board to report to the board at its office in Columbia, S. C., for induction at 8:30 A. M., September 30, 1943. He made up his mind not to report and so notified his father, who was anxious that he report and be inducted. His father arranged with a state magistrate and two local officers to take defendant by force and carry him to the induction center at the time fixed for induction. On the morning of September [fol. 63] 30th, defendant, who lived two miles from the office of the board where he was required to report, was making no effort to report but, between 8 and 8:30 in the morning, was at his home engaged in shaving, and intending thereafter, not to report to the draft board, but to a United States Commissioner and explain why he had not complied with the board's order. While he was so engaged, the magistrate and officers who had been employed by his father arrived at his home and by a show of force compelled him to go with them to the induction center at Fort Jackson near Columbia, S. C., where they turned him over to the officers of the army charged with the duty of inducting draftees. Defendant notified these officers that he was a minister of the Gospel and that he refused to be inducted

into the army. He was finger printed and examined by them, but refused to take an oath or go through the induction ceremony, protesting throughout the proceedings that he would not be inducted.

At the conclusion of the induction ceremony in which other draftees participated, defendant was notified that he was in the army, notwithstanding his refusal to be inducted. He was granted a three weeks leave along with the other draftees and was ordered to return to Fort Jackson three weeks later. He returned in accordance with this order but refused to put on the army uniform or obey orders. He was tried by a court martial for disobedience of orders and sentenced to a term of imprisonment but, after the decision in *Billings v. Truesdell*, 321 U. S. 542, was released on habeas corpus. He was then indicted in the court below for failure to report for induction as ordered by the draft board. [fol. 64] Upon the facts as stated, there was no error in refusing to direct a verdict of not guilty; for defendant was guilty, on his own admissions, of failing to report for induction as ordered by the board. Not only does he admit that he did not intend to report and remained at home when he would necessarily have been on his way to the board's office if he had intended to comply with its order, but also that, after he had been forcibly carried to the place of induction, he persistently maintained an attitude of defiance and repeatedly stated that he would not be inducted. To report for induction means to present oneself not only at the appointed place but also in readiness "to go through the process which constitutes induction into the army." *United States v. Collura*, 2 Cir. 139 F. 2d 345, approved in *Billings v. Truesdell*, 321 U. S. 542 at 557. Certainly one who has made up his mind not to report for induction and who, after having been dragged by force to the induction center, persistently refuses to go through the process of induction, cannot be said to have reported for induction as ordered by the board, within any possible meaning that can be given to that language.

Defendant makes two arguments which are in large measure inconsistent with each other. One is that the forcible seizure made it impossible for him to report to the board and thus excuses the failure to report; the other, that he was actually present at the induction center and thus substantially complied with the order of the board. A forcible seizure which made it impossible to comply with the board's

order would doubtless be a defense; but nothing of the sort is involved here. The seizure made it, not impossible, but possible, for defendant to comply; and, with the opportunity [fol. 65] for compliance at hand, he failed to avail himself of it. Likewise, presence at the induction center, rather than at the board's office, would doubtless be sufficient compliance on the part of one who was attempting to comply with the order to report for induction, but not on the part of one who had been carried there against his will and who, being there, persistently refused to be inducted. One ordered to report for induction who presents himself at the place designated with the statement that he does not intend to be inducted at all, can hardly be said to have reported for induction. A fortiori, one who is present at the place of induction only because he is carried there by force, and who defiantly refuses induction throughout the period of his presence, cannot be said, in any reasonable sense, to have reported for such purpose. This should be so obvious as not to require statement.

Directly in point is the decision of the Second Circuit in the case of *United States v. Collura*, *supra*, cited with approval by the Supreme Court in *Billings v. Truesdell*, *supra*. In that case, where the charge was failure to report for induction, the draftee appeared at the induction station at the appointed hour but stated that he refused to be inducted unless given a guarantee against compulsory vaccination. In affirming a conviction the court said, 139 F. 2d at 345:

"Obviously the duty to report for induction means more than putting in an appearance at the induction station. The selectee must not only appear but must be ready to go through the process which constitutes induction into the army. Admittedly the appellant did not report for induction, but reported for the purpose of making a bargain with the military authorities and entering the army only if [fol. 66] the terms agreed upon were satisfactory to his personal views as to vaccination."

In the case at bar the draftee did not report for the purpose of making a bargain with the military authorities as a condition of induction. He did not report at all. He was forcibly taken to the induction station and, being there, refused unconditionally to be inducted. See also *United States v. Longo*, 3 Cir. 140 F. 2d 848.

On the second question, we think it clear that the trial court was correct in excluding evidence as to the alleged ministerial status of defendant and refusing to charge the jury with regard thereto. Whether the defendant was entitled to exemption from military service or not on the ground that he was a minister of religion, this was a question of fact committed to the determination of the draft board, with appeal to the appeal board and in a limited number of cases to the President, but with no provision for review by the courts. *United States v. Grieme*, 3 Cir. 128 F. 2d 811, 814-815. It was his duty to comply with the board's orders; and, in a prosecution for failure to do so, no defense based on the invalidity of the orders can be entertained. *Falbo v. United States*, 320 U. S. 549. Compliance with the board's orders includes submitting to induction, which is the last step in the process leading to induction; for "the order of the local board to report for induction includes a command to submit to induction." *Billings v. Truesdell*, 321 U. S. 542, 557. As said by the Supreme Court in the case last cited:

"But induction under the Act and the present regulations is the end product of submission to the selective process and compliance with the orders of the local board. It must [fol. 67] be remembered that sec. 11 imposes on a selectee a criminal penalty for any failure 'to perform any duty required of him under or in the execution' of the Act 'or the rules or regulations made pursuant thereto.' He who reports to the induction station but refuses to be inducted violates sec. 11 of the Act as clearly as one who refuses to report at all. *United States v. Collura*, *supra*. The order of the local board to report for induction includes a command to submit to induction. Though that command was formerly implied, it is now express. The Selective Service Regulations state that it is the 'duty' of a registrant who receives from his local board an order to report for induction 'to appear at the place where his induction will be accomplished,' 'to obey the orders of the representatives of the armed forces while at the place where his induction will be accomplished,' and 'to submit to induction.' (Italics supplied.)

Defendant argues that he has exhausted the administrative process, as required by the *Falbo* case, when he has submitted to physical examination and been accepted by the military authorities, and that it is then open to him, if

charged with refusal to obey the board's order with respect to the final matter of submitting to induction, to attack the validity of the order by showing that the board had classified him unreasonably. The trouble with this position is that the administrative process is not exhausted until the order of the board is complied with, which, as we have seen, embraces submitting to induction. When the *Billings* case is considered in connection with the *Falbo* case, there can be no question as to the correctness of this conclusion. In the *Billings* case, the court, after using the language which we have quoted above, goes on to say:

[fol. 68] "Moreover, it should be remembered that he who reports at the induction station is following the procedure outlined in the *Falbo* case for the exhaustion of his administrative remedies. Unless he follows that procedure he may not challenge the legality of his classification in the courts. * * * These considerations together indicate to us that a selectee becomes 'actually inducted' within the meaning of sec. 11 of the Act when in obedience to the order of his board and after the Army has found him acceptable for service he undergoes whatever ceremony or requirements of admission the War Department has prescribed."

Following the procedure prescribed thus embraces undergoing induction; and not until this has been done may the legality of classification be challenged. *United States v. Rinko*, 7 Cir. 147 F. 2d 1; *United States v. Flakowicz*, 55 F. Supp. 329, Aff. 2 Cir. 146 F. 2d 874. The inductee may, of course, apply for habeas corpus as soon as his induction into the army is completed, and need not wait until he is court-martialed for disobedience of military orders.

This court was of opinion when the cases first arising under the Act came before us that the invalidity of an order of classification arising from the denial of due process might be asserted as a defense to a prosecution for failure to obey the order. See *Barley v. United States*, 134 F. 2d 998, 999; *Goff v. United States*, 135 F. 2d 610. A different view, however, had been taken by the Circuit Court of Appeals of the Third Circuit in *United States v. Grieme*, 128 F. 2d 813, 815, where that court said:

[fol. 69] "We think it is clear that, if a local draft board acts in an arbitrary and capricious manner or denies a registrant a full and fair hearing, the latter, although

bound to comply with the board's order, may, by writ of habeas corpus, obtain a judicial determination as to the propriety of the board's conduct and the character of the hearing which it afforded. The registrant may not, however, disobey the board's orders and then defend his dereliction by collaterally attacking the board's administrative acts."

In the *Goff case*, *supra*, we expressly referred to the *Grieme case*, and, in justification of not following it, said: "It would seem . . . that the total invalidity of an order which would be necessary to justify release on habeas corpus would constitute a defense to a criminal action based on disobedience of that order." The Supreme Court, however, in the *Falbo case*, after referring to the conflict of view between the *Goff* and *Grieme cases*, adopted the view of the latter; and in his concurring opinion in *Hirabayashi v. United States*, 320 U. S. 81, 108, 109, Mr. Justice Douglas referred to the rule of the *Grieme case* as settled law, saying: "There are other instances in the law where one must obey an order before he can attack as erroneous the classification in which he has been placed. Thus it is commonly held that one who is a conscientious objector has no privilege to defy the Selective Service Act and to refuse or fail to be inducted. He must submit to the law. But that line of authority holds that after induction he may obtain through habeas corpus a hearing on the legality of his classification by the draft board." (Italics supplied.) If habeas corpus is the remedy by which the validity of classification is to be tested, then, unquestionably, submission to induction is a necessary [fol. 70] part of the preliminary process; for, not until the inductee is actually in the army is he deprived of his liberty so that habeas corpus will lie.

In the *Goff case* we were impressed with the thought that the validity of an order might be challenged wherever failure to comply with it was alleged. The Supreme Court has taken the view, however, that considering the dangers which might flow from delay in time of war, a reasonable interpretation of the Selective Service Act requires that orders of the draft board be complied with and all administrative remedies thereunder be exhausted before they may be challenged in the courts. This is in accord with the holding that the validity of O. P. A. regulations may be

challenged only after administrative procedures have been exhausted, and then only in a particular court. Cf. *Yakus v. United States*, 321 U. S. 414, 427-430. Among the advantages in cases such as this of limiting the remedy of the draftee to habeas corpus proceedings commenced after the administrative processes has been completed, is that unnecessary delays in the raising of the army are avoided and questions which are primarily constitutional in character are heard before a judge without the distractions and uncertainties likely to accompany a criminal jury trial. Constitutional rights of citizens must, of course, be preserved in war as well as in peace; but the procedure outlined in the *Falbo* and *Billings* cases enables the courts to preserve them without unduly interfering with the war effort.

An additional reason for sustaining the action of the trial court is that there was nothing tendered by defendant sufficient to show such a denial of due process as would result in invalidity of the draft board's order. It was [fols. 71-72] certainly for the board to say whether a college student eighteen years of age, majoring in engineering, and claiming to be a minister of religion merely because he distributed Bible literature and conducted Bible studies, was a minister of religion within the meaning of the Selective Service Act. See 53 F. Supp. 583-584. The decision of the board was affirmed by the appeal board and by the President; and there was nothing offered to show that in any of the proceedings defendant was denied any constitutional right. Even if the rule of the *Goff case* be applied, therefore, there was no error; for it must be remembered that, with respect to the right to assert the invalidity of the board's order as a defense, we said in that case: "This does not mean that the court in a criminal proceeding may review the action of the board. That action is to be taken as final, notwithstanding errors of fact or law, so long as the board's jurisdiction is not transcended and its action is not so arbitrary and unreasonable as to amount to a denial of constitutional right."

There was no error and the judgment appealed from will be affirmed.

Affirmed.

[fol. 73] JUDGMENT—Filed and Entered April 4, 1945

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5329

LOUIS DABNEY SMITH, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for
the Eastern District of South Carolina

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of South Carolina, and was argued by counsel.

On Consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

John J. Parker, Senior Circuit Judge. Morris A. Soper, U. S. Circuit Judge. Armistead M. Dobie, U. S. Circuit Judge.

April 9, 1945, petition of appellant for a stay of mandate is filed.

ORDER STAYING MANDATE—Filed and Entered April 9, 1945

(Style of Court and Title Omitted)

Upon the Application of the appellant, by his counsel, and for good cause shown,

It Is Ordered that the mandate of this Court in the above entitled cause be, and the same is hereby, stayed pending [fol. 74] the application of the said appellant in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided said application is filed in the said Supreme Court within 20 days from this date.

April 9th, 1945.

John J. Parker, Senior Circuit Judge.

[fol. 75] UNITED STATES SUPREME COURT, OCTOBER TERM,
1944

Number —

LOUIS DABNEY SMITH, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the United States
Fourth Circuit Court of Appeals at No. 5329 CCA-4

STIPULATION

Subject to the approval of this court, it is hereby stipulated and agreed by and between attorneys for the respective parties hereto, that, for the purpose of the petition for a writ of certiorari, the printed record shall consist of the following documents:

1) Printed appendix filed by appellant, Louis Dabney Smith, in the circuit court of appeals.

2) Printed appendix filed by appellee in the circuit court of appeals.

3) One copy of the opinion of the United States Fourth Circuit Court of Appeals, dated April 4, 1945, and filed in this cause.

4) One copy of the judgment of said circuit court of appeals rendered on April 4, 1945, pursuant to the opinion filed herein.

5) One copy of the order staying the mandate pending application in the Supreme Court of the United States for a writ of certiorari to the Fourth Circuit Court of Appeals.

6) One copy of the docket entries of the clerk showing the nature of all papers filed herein, and the date of filing of each, together with a minute of all actions taken by the court in this cause, in the said circuit court of appeals.

7) A copy of this stipulation.

It is further stipulated and agreed that petitioner will cause the clerk of said circuit court of appeals to certify to the Supreme Court all exhibits not reproduced in the

printed appendices before the circuit court of appeals, including petitioner's Selective Service file, and that reference may be had to such exhibits with the same force and effect as though incorporated in the printed record.

[fol. 76] It is further stipulated and agreed that the Clerk of the United States Fourth Circuit Court of Appeals may certify the above named documents to be the entire designated record as stipulated and agreed upon by the parties, said certificate to be included as the last document in the book or binder comprising said record.

Dated, April 16, 1945.

Charles Fahy, Solicitor General of the United States,
Counsel for Respondent; Hayden C. Covington,
Counsel for Petitioner.

[fol. 77]

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,

Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the appendix to brief of appellant; appendix to brief of appellee, and the proceedings in the said Circuit Court of Appeals, including opinion, judgment, order staying mandate, docket entries, and stipulation as to record, in the therein entitled cause, as the same remain upon the records and files of the said Circuit Court of Appeals and, together with the original exhibits certified separately, constitute and is the entire designated record as stipulated and agreed upon by the parties, for use in the Supreme Court of the United States on an application for a writ of certiorari.

In Testimony Whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 17th day of April, A. D., 1945.

Claude M. Dean, Clerk, U. S. Circuit Court of Appeals, Fourth Circuit. (Seal.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 28, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

(9607)